Decision No 222 of 20 April 2023 on the exception of unconstitutionality of Article 159 (3), final sentence, of the Criminal Code and Article 386 (2) of the Code of Criminal Procedure,
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Summary

I. As grounds for the exception of unconstitutionality, its author stated that, in accordance with the final sentence of Article 159 (3) of the Criminal Code, reconciliation can produce effects only if it takes place 'until the document instituting the proceedings has been read'. That phrase creates a clear discrimination between, on the one hand, the persons in respect of whom, in the course of the criminal proceedings, the prosecutors gave a proper classification of the alleged offences and, on the other hand, the persons in respect of whom the legal classification of the offence was wrongly established. Moreover, during the criminal proceedings, neither the rights and freedoms judge nor the preliminary chamber judge has functional competence to analyse the legal classification of the offences. This is done exclusively by the judge of first instance, at the trial stage, thus exceeding the deadline by which the reconciliation could take place.

The legislator intended to correct, by means of Article 386 (2) of the Code of Criminal Procedure, errors in legal classification during the criminal investigation stage, regulating the concept of the change of legal classification. However, the legislator did not regulate the situation in which the change of legal classification is intended to operate a shift from a criminal offence in respect of which the reconciliation is not possible, as a ground for the exclusion of criminal liability, to a situation in respect of which reconciliation produces legal effects.

II. Having examined the exception of unconstitutionality, the Court held that Article 386 (1) of the Code of Criminal Procedure lays down the obligation for the court to inform the parties about the new legal classification and about the right of the defendant to request that the case be postponed or that the case be left at the end of the hearing, in order to have time to prepare his/her defence. At the same time, in paragraph (2), the legal text mentions only the specific situation of the offences for which, in order to continue the criminal proceedings, a prior complaint by the injured party is required, although it is also possible that the new legal classification may activate, by the nature of the new offence, another ground for termination of criminal proceedings, namely the reconciliation, expressly provided for in Article 16 (1) (g) of the Code of Criminal Procedure. In that situation, the Court found that there is unequal legal treatment between the parties to those proceedings, seriously prejudicing their procedural rights and guarantees.

If the new offence is among those for which the legislator expressly provided that it is possible for the parties to reconcile, the defendant will focus not on the preparation of the defence at the trial, but rather on negotiating reconciliation with the injured party, for which purpose he/she will endeavour to repair the damage or to fulfil other claims of the injured party.

The effect of a reconciliation with the injured party would be that of termination of the criminal proceedings, but the Court noted that there is a procedural discrepancy in time between the deadline by which the reconciliation can take place, as laid down in the final sentence of Article 159 (3) of the Criminal Code, and the time until which the legal classification of the offence can be changed, as required by Article 386 of the Code of Criminal Procedure. As the legal classification is changed, as a rule, after reading the document instituting the proceedings, the Court found that the court, even if it changes the classification of an offence for which there is a possibility of reconciliation, it cannot take note that the parties have reconciled, since the final sentence of Article 159 (3) of the Criminal Code requires it not to give effect to the

reconciliation act unless it has taken place until the document instituting the proceedings has been read. In practice, no rule in the current legislation allows the court to take note of a reconciliation after reading the document instituting proceedings, even in the event of a change in the legal classification of the offence. This is because Article 386 of the Code of Criminal Procedure, which rules on the procedural situation in the event of a change in the legal classification of the offence, makes no mention of this point.

The Court has consistently held in its case-law that, in a situation of legislative omission, it is not possible to speak of a mere choice on the part of the legislator if the legislator's failure to act infringed constitutional rules, so that the irregularity of unconstitutionality brought before it cannot be ignored by the Constitutional Court. The right of defence and the right to a fair trial are guaranteed at constitutional level and the right to reconcile, in cases where the law expressly provides for it, is a fundamental right in current criminal law. However, the parties to the cases in which it is decided to change the legal classification of the offence are unjustly deprived of that right.

The Court noted that the lack of respect for those fundamental rights is due to the lack of consistency between the new and old rules of criminal law and criminal procedural law in terms of correlation of the two legal concepts – the reconciliation and the change of legal classification. Thus, according to Article 132 of the 1969 Criminal Code, parties' reconciliation was possible until the final settlement of the case, which did not create problems with the right to reconcile; if the legal classification of the offence changed, the parties had that right throughout the course of the criminal proceedings, including in the appeals stage. The new legislation contained in the final sentence of Article 159 (3) of the Criminal Code, setting the deadline for the reconciliation until the reading of the document instituting the proceedings, created this inconsistency and unfair treatment in such proceedings. However, the reason for establishing the reconciliation as a cause which removes criminal liability and extinguishes the civil action lies precisely in the benefit of the effective realisation of those legal effects, and not in the elimination of access to that benefit by imposing a certain procedural time limit within which reconciliation may take place.

Thus, the Court found that the specific effect of the new phrase 'and if it takes place until the document instituting the proceedings is read' in the final sentence of Article 159 (3) of the Criminal Code, read in conjunction with Article 386 of the Code of Criminal Procedure, concerning the change of legal classification, is to prevent the defendant from gaining access to the legal benefits of reconciliation if it becomes effective as a result of the change in legal classification. In other words, if, after reading the document instituting proceedings, new elements emerge which lead to a legal reclassification of the offence into a criminal offence in respect of which the parties may reconcile, it cannot produce the legal effects enshrined in law. On the other hand, it is not possible to ask the court to change the legal classification prior to reading the document initiating proceedings, since neither the judge of rights and freedoms nor the judge of the preliminary chamber have any powers to do so. It follows that, regardless of the stage of judicial proceedings at which the request for the parties' reconciliation would intervene as a result of the change in the legal classification of the offence, the request would be rejected as inadmissible.

The legislator is entitled to impose various procedural time limits and detailed rules for the exercise of rights, even restrictions on the exercise of those rights, the only limitation being due to the maintenance of a fair balance between respect for the general interests of the State, on the one hand, and the rights and legitimate interests of other holders, on the other. The legislative measure under consideration cannot be characterised as a necessary one in a democratic society or indispensable for the rule of law and for the delivery of justice, since, in relation to the old rules of the Criminal Code, which allowed reconciliation to take place throughout the course of the proceedings, until the final settlement of the case, no decisions of

unconstitutionality have been pronounced and no systemic difficulties have been encountered in the interpretation and application process. Although the need for a legislative measure is not obvious, the Court found that it could not even be proportionate to the intended purpose, since the purpose is a general one, of principle (avoiding uncertainty in the course of the proceedings), and the consequences of the application of that measure are obvious, effective and negative, consisting of the removal of fundamental rights in the conduct of criminal proceedings.

It is unequivocally clear that the lack of correlation between the reconciliation of the parties, reconfigured in the light of the new Criminal Code, with the concept of change in the legal classification of the offence, which has not been amended, is contrary to the provisions of Articles 16, 21 and 24 of the Constitution.

The Court stated that not the introduction of the time-limit, i.e. the reading of the document instituting proceedings in the final sentence of Article 159 (3) of the Criminal Code, was in itself unconstitutional, since that time limit was necessary, as a rule, in order to ensure a stable and predictable procedural framework, but the procedural obstacle which it represented in producing the specific legal effects of reconciliation of the parties, in the exceptional case where that concept became relevant as a result of a change in the legal classification of the offence, after the document instituting the proceedings has been read, was unconstitutional. Taken individually, each of those two texts meets the requirements of constitutionality examined in the present case, but only in conjunction with each other and applied in the situation under consideration, they acquire, by systematic interpretation, unconstitutional effects. The Court therefore found that the legislative solution contained in the final sentence of Article 159 (3) of the Criminal Code, concerning the phrase ‘and if it takes place until the document instituting the proceedings is read’, was constitutional only in so far as it did not apply in the event of a change in the legal classification of the offence, after reading the document instituting the proceedings, into an offence for which the law expressly provided that reconciliation was possible.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the legislative solution contained in the final sentence of Article 159 (3) of the Criminal Code, concerning the phrase ‘and if it takes place until the document instituting the proceedings is read’, was constitutional only in so far as it did not apply in the event of a change in the legal classification of the offence, after reading the document instituting the proceedings, into an offence for which the law expressly provided that reconciliation was possible.

Again unanimously, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 386 (2) of the Code of Criminal Procedure were constitutional in relation to the complaints raised.